80-762

No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FLEUR WILLIAMS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Does the Fourth Amendment of the United States Constitution permit Drug Enforcement Administration Agents to enter a third person's home to execute a one year old arrest warrant for another, without first obtaining a search warrant where there are no exigent circumstances or other exceptions to the warrant requirement?

2. Did the trial Judge in the Federal District Court err in not requiring the government to produce citizen witnesses at the hearing on the motion to suppress the Physical Evidence?

PARTIES BEFORE COURT OF APPEALS

1. David Manley - Appellant
2. Fluer Williams - Appellant
3. United States of America - Appellee

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TO REVIEW THE JUDGMENT OF
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals, decided September 15, 1980 (App. A) is not yet reported.

The District Court's opinion (App. B 1) on the motion to suppress physical evidence was not reported. The District Court judgment is set forth at Appendix B 2.

JURISDICTION

On September 15, 1980, the Court of Appeals for the Second Circuit entered its opinion affirming the District Court decision below. The jur.sdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable

cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment to the Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On the evening of April 12, 1979, at about midnight, Drug Enforcement Administration ("DEA") agents executed an arrest warrant one year after the warrant was issued at the home of Fleur Williams. After entering Williams' home, the agents found various contraband, but did not find the subject of the arrest warrant. The DEA agents arrested Fleur Williams and David Manley for possession of the contraband. Williams was the owner of the house and present at the time of the raid. Manley was visiting Williams and was found to have two thousand two hundred and twenty dollars in his pocket (P. 26). Four other people, three women and a man, were also present but not arrested.

Donald Grant, also known as Danny Warren, was the subject of that arrest warrant which was issued on April 12,

1978 by a magistrate in the southern district of New York. Subsequently, after indictment for drug trafficing, a superseding warrant for his arrest was issued. These warrants listed the names Danny Warren a/k/a/ Danny Williams a/k/a Donald Grant a/k/a Rolls Royce Danny a/k/a Champagne Danny. No description or address was mentioned in the warrant. All the DEA agents who testified at the hearing on the motion to suppress the physical evidence in the Federal District Court were aware of this outstanding warrant for Donald Grant. However, only one agent, Agent Ward, had actually seen Danny Warren in person, and Ward was not present when the other agents entered Williams's home (P. 24). Agent Ward in his testimony described Danny Warren as a man in his mid 30's, approximately 6'1" to 6'2" (P. 25). Fleur Williams is a man, 23 years of age and about 5'9"

tall. No agent had obtained an official police description compiled as a result of Danny Warren's prior arrest record (P. 36). The agents had established that Danny Warren lived in Manhattan at two locations; one, in Harlem and the other in the upper east side. The agents had established that Danny Warren was black, West Indian and drove a Rolls Royce. For 9 months, from April, 1978 to January of 1979, there seemed to have been little learned as to the whereabouts of Danny Warren. DEA Agent Raymond Kobyra, testified that in January of 1979, he had a conversation with an out-of-state confidential informant who told him that Danny Warren prior to January, 1979, had made short visits to the United States and on some of those visits had come to New York (P. 28). The informant also told Kobyra that Danny Warren, when in New York on those previous occassions had

his Rolls Royce serviced at Haug Motors. Again, from January until April, a period of 3 months, there seemed to have been no progress in the agents' investigation. In the beginning of April, 1979, Agent Kobyra went to Haug Motors for the first time with a photograph of Danny Warren, which he claims to have received from Danny Warren's mother. With the use of this photograph, Agent Kobyra questioned the employees at Haug Motors. Only one employee appeared to be able to identify the photo displayed to him (P. 29). This employee mistakenly thinking the photograph was a picture of Fleur Williams, a recent customer known to him as Billy, gave the agent the address of that customer. That employee, however, indicated to Agent Kobyra that the person he identified had only become a customer of Haug Motors within the last 3 months, a fact inconsistent with the information

Kobyra had received in January from his out-of-state informant (P. 39). Despite this inconsistency and after a delay of two more weeks, Kobyra proceeded to 191 Berry Hill Court, West Hempstead, Long Island, New York, the address given to him by the employee at Haug Motors. Kobyra displayed the same photograph he had previously displayed to the employee at Haug Motors to the local police and mailmen; none of whom made an identification. The photograph was also displayed to two neighbors of Fleur Williams at a house on Berry Hill Court (P. 30). Neither of these neighbors had ever spoken to Williams or seen him at a close distance. Berry Hill Court consisted of numerous houses, all of which were occupied by white families except for the Williams' home (P. 40). Both neighbors, after identifying the photos as an occupant of #191, were told

to call the agents when they saw him arrive home. Neither neighbor was asked to describe the individual they had identified. Kobyra received a call late on the evening of April 12 that someone had driven up to and entered 191 Berry Hill Court in a black chevrolet. The neighbor did not see the person who entered the house. After this call, Kobyra and his fellow agents proceeded to 191 Berry Hill Court. Agent Kobyra and Shea observed Williams at the front door but did not recognize him to be Danny Warren (P. 42). Williams was 5'9" and 23 years old as opposed to Warren, 6' and in his 40's. Williams retreated into his home. Agent Kobyra and Agent Shea approached the front door of Fleur Williams' home, displayed their weapons and by the use or threatened use of force, gained entry (P. 43). Agent Shea immediately confronted Fleur Williams and

restrained him by the front door, placing him in a prone position and handcuffing him. Agent Kobyra proceeded up the stairs into the kitchen to the rear door, helped DEA Agent Papantonio and another agent enter the premises and then proceeded to search the house.

While in the kitchen, Kobyra observed a scale (Exhibit 8), with white powder on it (Exhibit 1), and on the kitchen counter along side the scale, additional white powder (Exhibit 2). Kobyra then proceeded down a hallway and entered the master bedroom, confronted a woman named Shirley Faggart, spoke to her, and then left her alone in that room (Pp. 33-35). Kobyra further observed plastic bags of marijuana under a glass table in the hallway (Exhibits 5A-5F) and a strainer and two spoons found on the kitchen counter (Exhibit 9). Later Kobyra returned to the master bedroom and found

on the dresser another bag of white powder (Pp. 33-35), not seen by Kobyra the first time in that room. Another DEA agent, Papantonio, searched the master bedroom closet after Kobyra had done so and found a silver revolver on the top shelf (Exhibit 10) (P. 35). After the search of the house was completed, Kobyra asked Fleur Williams, the owner of the house, if he would consent to a further search of the house. Kobyra testified that Fleur Williams gave that consent and the search revealed brown garbage bags containing marijuana in a kitchen cabinet (Exhibit 4), marijuana in an opaque garbage bag on the floor of a bedroom closet (Exhibit 6), two bottles of lactose in a dresser drawer in the bedroom (Exhibit 7), and a small automatic pistol on a shelf in the bedroom closet (Exhibit 11). The defentants were given their Miranda

rights by DEA Agent Shea in the living room of the house.

The defendants were charged in a four count superseding indictment. The first count charged the defendants, Fleur Williams and David Manley, with knowlingly and intentionally conspiring to violate Section 841(a)(1) of Title 21, United States Code. Count 2 of the superseding indictment charged Fleur Williams with knowlingly and intentionally possessing with intent to distribute approximately 188 grams of cocaine in violation of Title 21, United States Code, Section 841(a)(1). Count 3 of the superseding indictment charged the defendant, David Manley, with knowlingly and intentionally attempting to possess with intent to distribute approximately 55 grams of cocaine in violation of Title 21, United States Code, Section 841(a)(1). The fourth count of the

superseding indictment charged the defendant, Fleur Williams, with knowlingly receiving a fire arm which has been shipped and transported in foreign commerce in violation of Title 18, United States Code, Section 922(h) and 924(a). This count of the indictment was later severed from the indictment and excluded from the trial.

A hearing on the motion to suppress the physical evidence was held before the Honorable Justice George C. Pratt in the Federal District Court for the Eastern District of New York. The Government refused to identify and produce the employee at Haug Motors who had identified the photograph of Donald Grant as Fleur Williams and also refused to identify and produce the neighbors, the only other identification witnesses. Judge Pratt, however, did have an in camera hearing with the neighbors, but

excluded defense counsel, allowing only submission of suggested questions.

After the hearing on the motion to suppress, Judge Pratt held the entry pursuant to the arrest warrant and subsequent search to be valid but suppressed all contraband found as the result of the consent search, ruling that said consent was not given freely and voluntarily.

On September 6, 1979, the defendants were tried before the Honorable Justice George Pratt and a jury for knowingly and intentionally possessing cocaine with intent to distribute in violation of Title 21, United States Code, Section 846 and for knowingly and intentionally possessing cocaine with the intent to distribute same in violation of Title 21, United States Code, Section 841(a)(1). At the end of the entire case, the court dismissed the conspiracy count leaving

only the possession with intent to distribute count as to each defendant.

After trial, the defendants were found guilty of knowingly possessing cocaine with the intent to distribute same in violation of Title 21, United States Code, Section 841(a)(1). Williams was later sentenced to six years imprisonment to be followed by a six year term of special parole.

Fleur Williams appealed from his judgment of conviction to the U.S. Court of Appeals for the Second Circut. On September 15, 1980, the Second Circuit affirmed the lower court decision. The appellant files this peition for writ of certiorari from that decision.

REASONS FOR GRANTING THE WRIT

A. THERE IS A CONFLICT BETWEEN THE U. S. COURT OF APPEALS FOR THE FOURTH AND SECOND CIRCUITS AS TO WHETHER TO ALLOW LAW-ENFORCEMENT AGENTS TO ENTER A THIRD PERSONS HOME WITH ONLY AN ARREST WARRANT AND ABSENT EXIGENT CIRCUMSTANCES.

The Fourth Circuit held in Wallace v. King, ____ F. 2d ___ (C.A. 4, July 1, 1980) that a seacrh warrant would be required absent an exception to the warrant clause of the Fourth Amendment, despite the existence of an arrest warrant.

The Second Circuit held in United States v. Arboleda, Slip Op. 3397, 3407 n. 6 (2nd Cir., June 9, 1980) that a search warrant was not required; but only "reasonable belief" that the party sought will be found on the premises.

That is the issue in this case, i.e., whether the agents could lawfully enter the home of Fleur Williams to execute the

arrest warrant for Donald Grant. Was there not the necessity that exigent circumstances existed before the agents could enter into the premises of Fleur Williams without a search warrant? It is obvious from the delay in Agent Kobyra's investigation over a period of one year that there were no exigent circumstances. Cases dealing with this issue concern law enforcement officers entering homes in pursuit of an individual they wish to arrest and where in some instances they had reasonable cause to believe that the individuals had committed felonies and had statutory authority to make such an arrest. In the case of Accarino v. U.S., 179 F.2d 456, the court stated at page 458:

> "'Where, as here, officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant. A search without a warrant demands exceptional

> circumstances as we held in Johnson v. United States, supra (333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436)...we cannot allow the Constitutional barrier that protects the privacy of the individual to be hurdled so easily.'" Supra.

The court emphasized that the need for a search warrant was not just a mere formality, but served a high function.

> "'We are not dealing with formalities. The presence of a search warrant serves a high function. Absence some grave emergency, the Fourth Amendment has imposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh a need to invade the privacy in order to enforce the law. The right of privacy has deemed too precious to entrust to the discretion of those whose job it is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desire of the police before they violate the privacy of

> the home. We cannot be true to the Constitutional requirement and excuse the absence of a search warrant without a showing of those who seek exemption from the Constitutional Mandate that the exigencies of the situation made the cost imperative.'" Supra at page 458.

The mandate discussed in the Accarino decision should have been followed by the agents in this case. We know now after the fact that the information the agents relied upon was not reliable, was inconsistent, and in the end, led to the invasion of a persons home, not the subject of the agents' investigation. If an independent magistrate had reviewed the information as required by Accarino, then the invasion into Fleur Williams' home may never have occurred. It seems logical that if the courts reject the right of the police to enter into premises after having witnessed a felony committed in their presence, that it

would be just as improper for the police to enter into those premises with an arrest warrant, absent an address and description. The court in the Accarino case emphasized in their decision that a government official cannot invade a private home, unless (1) a magistrate has authorized him to do so pursuant to a search warrant, or (2) an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate, i.e. the existence of exigent circumstances. Neither of these circumstances existed in the case at bar.

The warrant which Kobyra knew was outstanding for one year did not describe the person for whom they were looking for, but only contained the name Donald Grant along with three other aliases used by that individual. It should be noted that Kobyra nor any of the other agents had the warrant with them the night they

entered Fleur Williams' home. At no time did any of the agents announce their purpose and authority when they entered into the home of Fleur Williams (P. 31, 48). In Miller v. U.S., 357 U.S. 301, 2 L.Ed. 1332, 78 S.Ct. 1190. The court stated at page 313:

> "Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house. The petitioner could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose. Because the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful and the evidence seized should have been suppressed."

Here again the same behavior which this Court has found to be abhorrent was practiced by the agents when they entered into Fleur Williams' home. To allow agents to enter into ones home based upon

an arrest warrant, especially an arrest warrant that has been outstanding for a long period of time without having a magistrate determine whether probable cause existed to believe that that person can be found in particular premises would make the language in the Fourth Amendment a nullity. A considerable body of law has developed to protect the individual's belongings from unreasonable search and seizure in his home. It would be ridiculous to assert that the identical considerations do not operate to safeguard the individual himself in the same setting. In the case of United States v. Prescott, 581 F.2d 1343 (9th Cir., 1978), the court stated at page 1349:

> "The sanctity of the home is no less threatened when the object of police entry is a seizure of a person, rather than a thing. A magistrate's disinterested determination that government intrusion is

> warranted is no less desirable when the policeman's quarry is a suspect rather than a piece of evidence...The third circuit is of the opinion that in such a case, a search warrant, not just an arrest warrant is required. Government of Virgin Islands v. Gereau, (3rd Cir., 1974) 584 F.2d 914, 928."

The Court in the Prescott case emphasized that the difference between a search warrant and an arrest warrant is artificial and the Fourth Amendment makes no distinction. In the case at bar, the warrant which Agent Kobyra was carrying merely indicated a name with three aliases. It fell far short of what would be required to enter ones home as mandated by the Fourth Amendment. That combined with the fact that the warrant was a year old should have mandated that the law enforcement officers take whatever information they had to an impartial magistrate before authority was granted to enter into Fleur Williams'

home. The court, when issuing that arrest warrant, did not foresee that in a year's time that warrant would be used to enter a third persons home. furthermore, the arrest warrant lacked particularity, a Fourth Amendment requirement, and, therefore, could not be used as a substitute for a search warrant as mandated by the Fourth Amendment. The Prescott court addressed this problem when they stated at page 1350:

> "The warrant, whatever it is called, must describe 'the place to be searched,' here apartment 544 and 'the persons or things to be seized,' here Duvernay and the parcels."

A warrant for the arrest of a suspect may indicate that the police officer has probable cause to believe the suspect committed a crime; it affords no basis to believe that the suspect is in some strangers home. Reliance by police officers on arrest warrants to enter

homes offers too many opportunities for abuse, provides little comfort to a citizen peacefully in his home and affords insufficient protection against invasion of his privacy. Unless there are exigent circumstances, together with an arrest warrant, the court should not permit entry into a third persons home to execute said warrant unless and before all the facts the law enforcement officers have in their possession are weighed by objective and independent magistrates. This issue was confronted in the case of Government of Virgin Islands v. Gereau, 502 F.2d 914 (3rd Cir. 1974). In that case, the police got a tip from an informant that certain suspects were at 527 Hospital Street, and the FBI then proceeded immediately to that location. The suspects were involved in eight murders and were heavily armed, giving rise to the

existence of exigent circumstances. When the FBI arrived at the scene, three of the five suspects the FBI were looking for, came out of the building and were immediately arrested. The arrest of the suspects corroborated the information the informant had given and it was probable that the other two suspects were still in the building. Clearly this case is distinguished from the case at bar in that there existed exigent circumstances requiring immediate action by the FBI to enter the premises. In the case at bar no such exigencies existed. The court in the Government of Virgin Islands v. Gereau stated:

> "This court has made clear, however, that arrest warrants are not substitutes for search warrants. See Fisher v. Volz, 496 F.2d 333, 3382-343 (3rd Cir., 1974). Although police have warrants for the arrest of suspects they may enter premises, at least of third persons, to search for those suspects only in exigent

> circumstances where the police officers also have probable cause to believe the suspects may be within." Supra.

The facts clearly indcate that Agent Kobyra did not have a situation which would constitute exigent circumstances nor did he respond in a manner which would lead one to believe there were exigent circumstances existing. He waited three months before going to Haug Motors, two weeks before responding to Berry Hill Court, and several more hours before returning to Berry Hill Court to enter the premises of Fleur Williams.

In Dorman v. U.S., 435 F.2d 385 (1970), the court held the Fourth Amendment must give way where the circumstances did not tolerate delay. They discussed the principle of urgent need, i.e. exigency, and they held that only in light of exigent circumstances the need of avoidance of the Fourth

Amendment requirement can be upheld. Dorman involves the robbery of a clothing store that took place only two hours earlier. The victims in that robbery made an identification of the defendants immediately, and the entrance by law enforcement officers was into the home of the defendant himself. The court stated at page 389:

> "The requirements of a warrant, as now generally understood, rests primarily on the conception that it is for a judicial officer, and not the prosecutor or the police, to determine whether the security of our society, which is essential to the maintainance of law, requires that the right of privacy yield to a right of entry, search and seizure, and what limitation and specification of entry may be appropriate and reasonable."

The proposition that the Fourth Amendment should impose the same restrictions on arrests as search and seizures, was reiterated by Justice

Powell in the United States v. Watson decision, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed. 2d 598 (1976).

The sanctity of the home is the most important right the Fourth Amendment seeks to protect. U.S. v. Houle, 603 F.2d 1297 (8th Cir., 1979), United States v. Reed, 572 F.2d 412 (2nd Cir., 1978), United States v. Jarvis, 560 F.2d 494 (2nd Cir., 1977). Judge Frank also eloquently described the sanctity of the home in his opinion when he said:

> "A man can still control a small part of his environment, his house, he can retreat thence from outsiders secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizeable hunk of liberty worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some enviolate place which is a mans castle. U.S. v. On Lee, 193 F.2d 306, 315-16 (2nd Cir.)(Frank J. dissenting) aff'd 343 U.S.

747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952)." Supra.

The Reed case, supra, reviews the question under what circumstances the Fourth Amendment permits federal law enforcement officers to enter a suspects home in order to effect a felony arrest for which the officers have both statutory authority and probable cause but no search warrant. The case involved purchases of heroine by the DEA from Reed and another named Goldsmith and a subsequent arrest of Reed and Goldsmith in Reed's apartment some two and a half months after the last transaction. In that case, the agents knew both Reed and Goldsmith in that they had purchased heroine directly from the two of them. Certainly, the agents had probable cause to arrest Reed and Goldsmith and had the statutory authority to do so, but the court held that it was required for the agents to procure an arrest warrant

before such an arrest could be made in the home of Reed. The court stated that a judge or magistrate should first review all the facts before a warrant would be issued to enter the home. Katz v. United States, 389 U.S. 345, 357, 88 S.Ct. 507, 514, 19 L.Ed. 2d 576 (1967), Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 479, 91 S.Ct. 2022, Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed. 2d 685 (1969). The Reed case reviewed the holdings in Miller, supra, McDonald v. United States, 335 U.S. 451, 453, 456, 69 S.Ct. 191, 192, 93 L.Ed. 153 (1948), Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 2d 436 (1948), Dorman, supra, Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967), and many other cases in which the sanctity of the home is described as the core of the Fourth Amendment and invasion into ones home is just the type of

serious governmental intrusion that the Fourth Amendment was designed to circumscribe by the general requirement of judicial determination of probable cause. The court stated at page 424:

> "We emphasize that no matter who the officer is or what his mission, a government official cannot invade a private home, unless (1) a magistrate has authorized him to do so, or (2) an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate." U.S. v. Reed, supra, page 424.

The court concurred with the findings in the cases they reviewed and held that the invasion into the home to arrest the defendant was illegal without a warrant, notwithstanding the fact that the agents had probable cause and statutory authority to make the arrest. In the Reed case, the agents had actually purchased drugs from the defendant and had probable cause to arrest the

defendant. The court still required the DEA agents to present their evidence to an independent magistrate. In the case at bar, the agents should have taken the information they had acquired to an independent magistrate in order to weigh that evidence to see if there was probable cause to believe that the subject of their warrant was the person residing at 191 Berry Hill Court. It should be emphasized that the only determination a magistrate had made in this case was that there existed probable cause that Danny Warren had violated the narcotics law; not that he would be found at Fleur Willams' home.

The Fourth Amendment forbids police entry into a private home to search for and seize an object without a warrant. In the case of an arrest of a person, where the invasion of personal privacy interest is that much greater, the

protection afforded by the amendment should not be cast aside based solely upon the arresting officers subjective notion of probable cause. A citizens guarantee to be free from unreasonable governmental intrusions does not rest upon whether the intrusion was for the purpose of an arrest or whether the intrusion was for the purpose of search and seizure. Both intrusions must be dealt with on an equal basis in order to preserve the validity of the Fourth Amendment. If we said otherwise, a police officer armed with an arrest warrant, believing the subject of the warrant was at a particular location, could circumvent the warrant clauses of the Fourth Amendment. Under those circumstances, the police officer should not execute on those premises without first having an independent magistrate weigh that evidence, unless exigent

circumstances exist. To say otherwise would result in a flood of searches by law enforcement officers armed with arrest warrants only and thereby in effect voiding the mandate of the Fourth Amendment. At the core of the Fourth Amendment, whether in the context of a search or an arrest, is the fundamental concept that any governmental intrusion into an individual's home or expectation of privacy, must be strictly circumscribed. The courts have unanimously held that the decision to enter a dwelling should not rest with an officer in the field but rather with the detached and disinterested magistrate. Johnson v. United States, 333 U.S. 10.

Justice Cooke of the New York State Court of Appeals stated this proposition in his dissenting opinion in People v. Payton, 45 N.Y. 2d 300 (1978) (later reversed by this Court, ___ U.S. ___ ,

No. 78-5420 and 78-5421, decided April 15, 1980). He said that prior judicial approval should control any contemplated entry, regardless of the purpose for which the entry is sought. He went on to say that arrest entries must be included within the scope of the Fourth Amendment, for while such entries are for persons, not things, they are nevertheless violations of privacy, the chief evil that the Fourth Amendment was designed to deter. The two conflicting interests here are that on one hand the state has an interest in apprehending felons and maintaining an orderly society, and on the other, the individual has an interest in the maximum security within his home. This security is not an absolute one, but one which must be tempered in certain circumstances when exigency exists. Lacking these exigencies, a citizen should be secure in the privacy of his

home unless a judicial officer has determined otherwise. These guarantees should be applicable not only in cases of entry to search for and seize property, but in instances of entry to search for and seize persons as well. It is not an onerous burden to place upon a police officer to first obtain judicial approval before entering ones home to make an arrest. It would not have been an onerous burden on Agent Kobyra to have first gone to a magistrate, presented the facts and let the magistrate make the decision as to whether there was probable cause to believe that the person named in the arrest warrant issued approximately one year earlier was then at 191 Berry Hill Court.

This court adopted Justice Cooks' dessenting opinion in Payton, supra, when it reversed the New York Court of Appeals decision. Payton v. New York--US--(No.

785420 and 785421, decided April 15, 1980). Justice Stevens stated at page 16 of Payton, supra:

> ". . .The Fourth Amendment protests the individuals privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home a zone that finds its roots in clear and specific constitutional terms: 'the right of people to be secure in their ...homes... shall not be violated'. That language unequivocally establishes the proposition that at the very core (of the Fourth Amendment) stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion. Silverman v. United States, 365 US 505, 511. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a fine line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."

The Payton decision addressed the problem that the only way to adequately

protect the privacy of a house was to seek a search warrant based on probable cause the suspect was at home at a given time. It was suggested that if a magistrate has determined there is justification for an arrest warrant to be issued, it is constitutionally reasonable to require him to open his doors to the police and, therefore, an arrest warrant implicitly carries a limited authority in entering the suspect's dwelling. However, in the case at bar the agents had a year old arrest warrant and had no known dwelling location for the subject during that year. The address the agents knew as the residence of Donald Grant had long since been vacated. If the agents had a reasonable belief that the subject of their arrest warrant would be found at the home of Fleur Williams, an independant judicial officer should have weighed their information before

authorization was issued to enter the home of the petitioner. The implicity authority to enter the house of the subject of an arrest warrant discussed in Payton, supra, could not apply to the home of a third party. It is in this situation that an independant magistrate must intercede to insure the integrity of the Fourth Amendment despite the existence of an arrest warrant.

In the case of United States v. Jarvis, 360 F.2d 494 (2d Cir., 1977), the underlying facts were very similar to the case at bar. In that case, agents armed with an arrest warrant for John Doe entered into Jarvis' home and arrested him pursuant to that John Doe warrant. The warrant did not contain any description of the person sought, however, a co-defendant's wife made a positive identification of Jarvis in a photo and Jarvis' car was traced to his

address.

In the Jarvis case, the agents were seeking to enter the home of the person they believed was mentioned in the John Doe warrant. In the case at bar, the agents were seeking to enter a home, not the home of the person who was the subject of the arrest warrant. The John Doe warrant, which the court stated, did not sufficiently describe the person sought, is much like the warrant for Donald Grant in that there is no description but only a series of four names which are as nondescript as the name John Doe. Since the agents had never viewed Donald Grant, they knew as much or less about Donald Grant as the agents in the Jarvis case knew about John Doe. The court in the Jarvis case stated at page 495:

> "If the prosecution were permitted to arrest on the basis of 'John Doe' warrants

> supplemented by extringent evidence, the requirement for a particularized warrant, issued by a magistrate, would become a nullity." U.S. v. Jarvis, supra, page 495.

In adherence to the Jarvis decision, it was incumbent on the agents to have taken all the information they had acquired concerning 191 Berry Hill Court to a magistrate to determine whether there was probable cause to believe that the subject of the arrest warrant could presently be found at 191 Berry Hill Court. The federal agents waited for approximately two weeks before going to 191 Berry Hill Court. The delay of a few more hours to obtain a valid search warrant from a magistrate would not have inconvenienced the agents.

The issue, whether a search warrant is a constitutional prerequisite to every search for a person named in an arrest warrant on the premises of a third person

has not been decided by this Court. The conflict in the U. S. Court of Appeals was created when the Fourth Circuit decided Wallace v. King, ____ F2d ____, (CA 4, July 1, 1980). This decision conflicted with the Second Circuit; decision in United States v., Arboleda, Slip Op. 3397, 3407 n. 6 (2d Cir., June 9, 1980).

The Fourth Circuit in Wallace, supra, noted that the issue was left undecided in Payton v. New York, _____ US _____, 27 CRL 3033 (1980). The Court found that not to require a search warrant controvened the "particularity" requirement of the Fourth Amendment and undercut the rationale upon which Fourth Amendment jurisprudence is founded. The Fourth Circuit reiterated that an arrest warrant indicates only that there is probable cause to believe the suspect committed a crime, it affords no basis to

believe that the suspect is in a stranger's house (Fisher v. Volz, 496 F2d at 341).

If search warrant procedures are at all meaningful for property searches, then it should be meaningful also for searches for persons. Searches precedent to arrest, unbounded by search warrant requirements and judicial determinations of probable cause, become a possible effective means of undercutting the restrictions of the Fourth Amendment and the policies behind them, and may lead to police use of broad exploratory searches for persons in order to provide lawful presence and inadvertent discovery of evidence. Therefore, when federal agents have no warrant authorizing the entry into a particular home and no circumstances necessitating immediate police action, it is constitutionally imperative to preclude law enforcement

officers from effecting a forceable or nonconsentual entry into a third person's home to execute an arrest warrant. Although it would be improper to judge Agent Kobyra's actions by what resulted, it is interesting to see that the result was an invasion into the home of a person other than that which was the subject of the arrest warrant. If no contraband were found in Fleur Williams' home, the invasion by the DEA would have been repugnent to our notions of privacy and safety in our homes. The colored judgment of law enforcement officials in ferreting out crime must be reviewed to prevent just such a mistake and to give substance to the Fourth Amendment. To accomplish this end, the conflict on this issue must be resolved by following the rationale of the Fourth Circuit.

B. THE DECISION OF THE SECOND CIRCUIT AFFIRMING THE DECISION OF THE DISTRICT COURT IN NOT REQUIRING THE GOVERNMENT TO PRODUCE CITIZEN WITNESSES AT THE HEARING ON THE MOTION TO SUPPRESS PHYSICAL EVIDENCE WAS CONTRARY TO APPLICABLE DECISIONS OF THIS COURT

Agent Kobyra was informed by the employee at Haug Motors that the person depicted in the photograph presented to the employee was using the address, 191 Berry Hill Court. The employee's testimony is the only testimony which brought Kobyra to that location. It was important to have that witness produced in court so that the defense could cross-examine the witness and determine the basis for the identification, how well he knew the person he thought was depicted in that photograph, what was the name of the person depicted in the photograph, how often he saw the person depicted in the photograph, and if the identification was consistent with the

information Kobyra had received from his confidential informant. Not only did the court refuse to direct the government to produce the witness and supply the name and address of the witness, but also refused to have an in camera hearing. The only other witnesses who identified the picture were the two neighbors, both of whom were in one house on Berry Hill Court. Their identities were not disclosed nor were they produced in court despite objections by the defense (pp. 62, 63). The community, and in particular the block of Berry Hill Court, consists of all white families. When the agents showed the picture of a black person to the neighbors without using a photo aray, the procedure was so suggestive especially considering the ethnic make-up of the community (all white), that the identification must be considered unreliable. The court should

have allowed the defense to question these witnesses to see if in fact their identifications were reliable. These three witnesses constituted the essence, core or main bulk of the agents alleged reasonable belief that Donald Grant was in the house. Denying defense counsel the right to examine these witnesses, denied the defense the opportunity to show the court that the agents actions were unreasonable. Nothing other than the testimony of these three witnesses could have given the agents reasonable cause or probable cause to believe that Donald Grant was in the home at 191 Berry Hill Court. To deny defense counsel the right to cross-examine the identification witnesses was in fact to deny defense a hearing on the motion to suppress the physical evidence. It appears from the courts memo from the in camera hearing with the two neighbors that these

neighbors did not know Fleur Williams very well, had never met him personally, and although it is not clear, did not have an opportunity to observe their neighbor at a close distance. This became apparent after the fact since their identification was mistaken. If these neighbors had been examined by defense counsel, it could have been determined whether the movements of Fleur Williams were consistent with the movements of Donald Grant as related by the confidential informant. It is important to note that the neighbor who telephoned Agent Kobyra did not see Fleur Williams, Donald Grant or anyone else in particular, enter the home at 191 Berry Hill Court. All he saw was a black chevrolet pull up to the house and someone enter. The neighbor did not specify who entered, whether he could see him, or whether he could tell if more

than one person entered.

Disclosure of these citizen witnesses is necessary to guard against any fabrication by the agents and to establish the reasonableness of the agents conduct. It should be emphasized that these citizen witnesses were not confidential informants who supplied the government on a continous basis with information. the only reason the government offered for not disclosing or producing these witnesses was a fear by the witnesses of some form of physical reprisal (P. 38). This representation is an unsubstantiated assertion and unfounded. The courts have found that even if there was such a likelihood, this alone did not warrant the invoking of the privilege of nondisclosure. In Re United States, 565 F.2d 19 (2nd Cir., 1977). In that case the court stated at page 22:

"However, the likelihood of

> physical reprisal is not a prerequisite to the invocation of the privilege..." Supra, page 22.

None of the three witnesses that made the identification were shown to be reliable.[11] None of these witnesses had given information to the agents on a prior occasion. The only way a fair determination of the issues on the motion to suppress could have been resolved would have been to examine these witnesses. In Re United States, supra, Roviaro v. U. S., 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1953); U.S. v. Alexander, 495 F.2d 552, 553 (2d Cir., 1974).

A discussion of the fairness of producing a witness was discussed in Roviaro, supra, at page 60.

> "A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the

> contents of his communications, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way....Most of the federal cases involving this limitation on the scope of the informants privilege have arisen where the legality of a search without a warrant is an issue and the communications of an informer are claimed to establish probable cause. In these cases, the government has been required to disclose the identity of the informant unless there are sufficient evidence apart from the confidential communication." Supra, page 60.

The courts have consistently held that the identity of an informant must be disclosed whenever the informants testimony is relevant and helpful to an accused. Portomene v. U.S., 221 F.2d 582; U.S. v. Conforti, 200 F.2d 365; Sorrentino v. U.S., 163 F.2d 627. The problem has always been one of balancing public interest. Those interests involve the flow of information as opposed to the

defendant's right to prepare his defense.

The only way in determining whether the agents had reasonable cause to believe that Donald Grant was in the premises at 191 Berry Hill Court was to question the employee at Haug Motors and the two neighbors who identified the photograph. Their testimony would have been extremely significant in determining the relevant factors on the motion to suppress. It is important to note that all the other information the agents had gathered would not, in and of themselves, give probable cause to believe Donald Grant was located at 191 Berry Hill Court. The courts have stated that disclosure is compulsory whenever the informants communications are essential to the establishment of probable cause. U.S. v. Tucker, 380 F.2d 204 (2nd Cir., 1967); U.S. v. Elgisser, 334 F.2d 110; United States v. Santiago, 327 F.2d 575;

United States v. Rosario, 327 F.2d 561 (2nd Cir., 1964); United States v. Robinson, 325 F.2d 391 (2nd Cir., 1963). The only information concerning 191 Berry Hill Court was the information given by the citizen witnesses and therefore, they should have been disclosed, as was held in the Robinson case, supra.

The government should have disclosed and produced the citizen witnesses not only to guard against fabrication of the agents, but so that the reasonableness of the agents actions, the reliability of the informants statements, and the basis for the informants knowledge could have been properly determined. The nondisclosure by the government of the citizen witnesses in effect denied the defendants an effective hearing on the motion to suppress, and therefore, was in violation of the defendants right of due process and right of confrontation as

guaranteed by the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 971, 996—September Term, 1979

(Argued April 25, 1980 Decided September 15, 1980)

Docket Nos. 79-1428, 79-1454

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID MANLEY and FLUER WILLIAMS,

Appellants.

B e f o r e :

WATERMAN, MESKILL and NEWMAN,

Circuit Judges.

Appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York after trial before Hon. George C. Pratt and a jury pursuant to which verdicts were returned finding appellant Williams guilty of possession of narcotics

with intent to distribute in violation of 21 U.S.C. § 841(a)(1), and appellant Manley guilty of attempting to commit that crime contrary to 21 U.S.C. § 846.

Affirmed.

STANLEY SCHIMMEL, Brooklyn, New York, *for Appellant Manley.*

BARRY TURNER, New York, New York, *for Appellant Williams.*

DAVID V. KIRBY, Assistant United States Attorney, Eastern District of New York, Brooklyn, New York (Edward R. Korman, United States Attorney, Harvey M. Stone, Assistant United States Attorney, Eastern District of New York, Brooklyn, New York, of counsel), *for the United States of America.*

MESKILL, *Circuit Judge:*

Fluer Williams and David Manley appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York after a jury trial before Hon. George C. Pratt. Williams was adjudged guilty of possession of narcotics with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and Manley guilty of attempting to commit that offense, in violation of 21 U.S.C. § 846. Numerous claims of error are raised by appellants, the most hotly contested of which concerns the propriety of

the entry made by agents of the Drug Enforcement Administration into Williams' home in order to execute an arrest warrant for a fugitive whom they erroneously believed to be on the premises. Appellants also complain of certain evidentiary rulings made in the course of the suppression hearing. In addition, Manley, arrested in Williams' home following the entry of the agents, assails the sufficiency of the evidence upon which his conviction for attempted possession of narcotics is based. For the reasons which follow, we deem these claims as well as others advanced by appellants to be without merit and accordingly affirm the judgments of conviction.

I.

Pursuant to a lengthy suppression hearing, the district court expressly found, or the uncontradicted testimony established, the following. In early 1978, one Danny Warren, whose true name was Donald Grant and who used a number of aliases including Danny Williams as well as the more colorful nicknames "Champagne Danny" and "Rolls-Royce Danny," was indicted in the United States District Court for the Southern District of New York for drug trafficking. Warren failed to surrender and consequently, in April of 1978, a warrant was issued for his arrest. The DEA investigation had revealed that Warren maintained two Manhattan residences, but that significant activities concerning his narcotics operations occurred on Long Island. The fugitive was described in DEA files as a black male of West Indian or Jamaican origin, approximately 6'0" tall, of medium build and in his mid or late forties.

Additionally, according to information credited by the DEA, Warren was of a violent disposition, and was likely to be armed.

Attempts to apprehend Warren were futile during 1978, but in January, 1979, DEA agent Raymond Kobyra, who had participated in the grand jury investigation but had never actually seen Warren, received information from a reliable out-of-state informant that Warren had been seen in the United States the preceding month, that he made occasional trips to the New York area and that his Rolls Royce was frequently taken for repairs or servicing to Haug Motors, a Manhattan foreign car dealership. Armed with at least two photographs of the fugitive, including one obtained from a woman believed by Kobyra to be Warren's mother, Agent Kobyra on April 12 paid a visit to Haug Motors where one of the employees identified Warren as a recent customer whose Rolls Royce was serviced at the shop. A check of Haug Motors' records revealed that the individual presented himself there as one Williams, that he owned a black and tan Rolls Royce bearing Washington, D.C. license plates, and that he listed his home address as 191 Berry Hill Court, West Hempstead, Long Island. A further check of the license plate number indicated that the automobile was registered to a female named Williams or Williamson who listed a home address in an impoverished section of Washington, D.C.

That afternoon, Agent Kobyra proceeded to the vicinity of 191 Berry Hill Court, where he questioned a number of persons. Two neighbors, without prompting, recognized Warren's photograph as portraying the occupant of the nearby one-family dwelling at No. 191.

They described that individual as a black male of Jamaican origin, in his mid-forties, approximately 5′8″ to 5′10″ in height, and of medium build. They stated that their neighbor maintained a lavish lifestyle, kept irregular hours, was often away for extended periods of time, and drove a Rolls Royce.

Later that night, at approximately 10:00 p.m., in accordance with Agent Kobyra's earlier request, one of these neighbors telephoned Agent Kobyra and stated that the occupant of 191 Berry Hill Court had arrived at his home. After summoning a number of other DEA agents for assistance for executing the warrant, Agent Kobyra, accompanied by Agent Shea, drove past the suspect's home at about midnight and observed a black male gazing out a picture window. After they parked the car somewhat beyond No. 191, the agents noticed that this individual had opened the front door and was lingering just outside the entranceway.

After radioing instructions to two other agents to position themselves at the rear of the house, Agents Kobyra and Shea quickly approached the figure on the landing above them, identified themselves as law enforcement officers, and asked to speak with him. The individual thereupon beat a hasty retreat to the interior of the home, locking the door behind him. On reaching the front landing, Agent Kobyra perceived either through the glass of the front door or through an adjacent window, a second black male, dressed in a burgundy colored shirt, darting from the kitchen, located in the rear of the house, towards other rooms. One or both of the agents had by this time drawn their revolvers, and by brandishing them induced the individual they had initially observed to open the front door.

After having gained entry, Agent Shea, who like Kobyra had participated in the investigation of Warren but had never actually seen him, immediately placed the individual face down, in a prone position, and handcuffed him. The party apprehended was not in fact Warren but appellant Williams, who is described as over 6′0″ tall, of medium build, and 23 years of age. Agent Shea also placed in custody one Deborah Robinson, Manley's sister-in-law, who was standing in full view upon an elevated landing inside the house when the agents burst in.

Apparently no conversation between Agents Kobyra or Shea and Williams took place at this juncture, and the state of mind of the agents upon confronting appellant is not entirely clear. Agent Kobyra confirmed in his testimony that immediately after gaining forcible admittance to the house he exclaimed "Where's Warren?," thus intimating doubt that Williams was the party sought. During the hearing, however, the agent stated emphatically, and his testimony was credited by the district judge, that given the strength of his belief that Warren was on the premises, he was not prepared to concede error until the house had been searched for the fugitive and Williams had established his identity as someone other than Warren through some authoritative method such as fingerprinting.

Detailed reflection was impossible in any case at this stage since events were unfolding rapidly. Immediately after Williams had been subdued, Kobyra rushed through to the kitchen, located in the rear of the house, to admit Agents Papantoniou and Yaniello. Approximately 30 seconds to a minute had elapsed between the forced admittance through the front door and the entry

of the back-up agents through the kitchen door. At this point, the agents observed in plain view on the kitchen table a triple beam scale, together with spoons and a strainer, and two mounds of a white, powdery substance, one resting upon the scale and the other on the table beside it.

The agents, aware of the presence of others in the house, and in accordance with standard operating procedure, conducted a security check of the premises. Agent Kobyra proceeded to the main bedroom where he encountered one Shirley Faggart, a companion of Williams, reclining on the bed. He searched the room, including its spacious closet, for other persons. Kobyra then left, but shortly thereafter returned with Agent Papantoniou, who discovered in plain view in the closet a small caliber revolver, and upon a dresser, again in plain sight, an additional packet of cocaine. Also pursuant to this security check, the agents inadvertently discovered two bags of marijuana in the hallway which had been placed under a glass-top table. At the same time, Agent Yaniello discovered Manley, apparently attempting to conceal himself in a small, unkempt bedroom. Manley was placed in custody in the same manner as Williams, that is, handcuffed while lying face down in a prone position.

Having secured the house, the agents assembled its various inhabitants in the living room and conducted a pat-down of appellants which yielded from Manley a wallet containing $2,222 in cash. Williams' wallet was recovered in the kitchen and was found to contain identification documents for three different persons. At about this time, a third black male, one John Harold, accompanied by a woman and a child, arrived at the

house, looking for Williams. The three were detained and Harold was frisked and found to be carrying a gun.

After the suspects had been read their rights, and each had signified his understanding, the agents questioned them. Manley stated that he had come for a social visit, that he had no knowledge of the presence in the house of narcotics, and that he would not know what cocaine looked like in any event. He further claimed that the money found on his person was the proceeds of his business, a food store located in Brooklyn. Williams, for his part, explained that the various identification documents found in his wallet were related to trouble he was having with the motor vehicle department over his license and stated that he too was unaware of the presence of narcotics on his premises. He noted that he had recently been visited by two women friends, whose names he could not recall, and that any contraband that might be found within the house was no doubt left by them.

Subsequently, the agents requested permission from Williams to conduct a full-scale search of the house to which the agents believed Williams assented on the condition that he could accompany them. During this purported consent search, Agent Kobyra discovered in the main bedroom a second handgun, several sacks of marijuana and two bottles of lactose, a commonly used dilutant of certain narcotics. Williams thereupon withdrew his consent to the search, which ceased. All detainees were then released save for Williams and Manley who were held for booking.

While en route to the Metropolitan Correctional Center, Williams stated to Agent Kobyra that the cocaine belonged to him and not to Manley. The

following morning, Manley, while being transported to his arraignment in the Eastern District stated that the police had arrested the wrong person, implying that Harold was the intended purchaser of the narcotics found in Williams' house.

Appellants were subsequently named in a four count indictment which averred, in its first count, that they had conspired to possess the narcotics found in Williams' home with the intent to distribute them. The second count charged Williams with possession and the third charged Manley with attempted possession. The final count, which was not submitted to the jury and which was subsequently dismissed, charged Williams, a previously convicted felon, with illicit possession of a firearm. Appellants moved to suppress all evidence obtained as a result of the arrests and the searches of Williams' house, essentially on the grounds that probable cause did not exist to execute the arrest warrant in Williams' home, that the searches thereof were unauthorized and beyond the lawful scope of the arrests and that the statements made by appellants were involuntary.

Following an extensive hearing, the district court concluded that the agents, whose testimony was credited, had acted in good faith, that they possessed a sufficient basis to attempt to execute the warrant in Williams' home, that the limited security check of the premises ancillary to the arrests was proper, and that the statements made by appellants were voluntary. Judge Pratt concluded, however, that the government had not adequately demonstrated that Williams' consent to the search of his house was freely given, and consequently suppressed the evidence uncovered by that search, to wit, the second handgun, certain bags of

marijuana, and the two bottles of lactose. Further, after an *in camera* examination by Judge Pratt of the two neighbors interviewed by the DEA on April 12, 1979, Judge Pratt held that Agent Kobyra's testimony concerning their pertinent statements and activities was fully substantiated, and the court consequently upheld the refusal of the United States Attorney to reveal their identities to defense counsel.

Trial commenced on September 6, 1979, and at the conclusion of the government's case, the court, upon motion, dismissed the conspiracy charge due to the failure of the government to establish any agreement or understanding between Manley and Williams. Subsequently, the jury returned verdicts adjudging Williams guilty of possession and Manley guilty of attempted possession of narcotics. Williams was later sentenced to six years' imprisonment to be followed by a six year term of special parole. Manley was sentenced to a three year term of imprisonment, which was suspended save for six months, to be followed by three years' special parole. The propriety of these sentences has not been challenged on this appeal.

II.

Appellants contend that there existed insufficient justification for attempting to execute the arrest warrant at Williams' home, and further assail the district court's refusal to order disclosure of the identities of the two neighbors who had identified Williams from Warren's photograph on the ground that their inability to examine the neighbors prejudiced their ability to demonstrate the agents' lack of

reasonable belief that the fugitive was on the premises of 191 Berry Hill Court. Further, the propriety of the initial search made following the forcible entry of the agents is challenged, and the introduction at trial of evidence seized pursuant to that search is assigned as error. Finally, Manley argues that his arrest was without probable cause, that its fruits, including the money found on his person and his inculpatory statements, should have been suppressed, and that in any event, the proof was insufficient to support his conviction for attempted possession of narcotics. These assertions are considered in turn.

A. *Reasonable Belief or Probable Cause for the Execution of the Arrest Warrant.*

Citing what appears to them as laxity in the investigative work which led the agents to 191 Berry Hill Court, appellants argue, in essence, that there existed insufficient probable cause to believe that the fugitive was to be found within. They note that four months elapsed between receipt of the original, purportedly reliable information from the confidential informant concerning Warren's patronage of Haug Motors and Agent Kobyra's appearance there. Appellants further note that the investigators never procured an accurate physical description of their quarry, although this information was available from their own files or those of other law enforcement organizations, and argue that had an accurate description been obtained, the agents would have instantly realized their mistake when they first confronted Williams. Moreover, they charge that the agents could not have reasonably relied upon the recognition of Warren's

photograph by the two neighbors since those individuals had had little or no contact with the occupant of No. 191 and were unable to discern distinguishing traits or features among blacks.

The law in this Circuit now holds that police may enter a dwelling to execute an arrest warrant for a person other than its owner or tenant where there exists "reasonable belief" that the party sought will be found therein. *United States v. Arboleda,* slip op. 3397, 3407 n.6 (2d Cir. June 9, 1980) (Friendly, *J.*); *see also United States v. Cravero,* 545 F.2d 406, 421 (5th Cir. 1976), *cert. denied,* 429 U.S 1100 (1977). It would appear that the "reasonable belief" standard, as it has been applied in this jurisdiction, may require less justification than the more familiar probable cause test. *But see United States v. Arboleda, supra* at 3416 (Oakes, *J.,* dissenting); *United States v. Hammond,* 585 F.2d 26, 28 (2d Cir. 1978). In the instant case, of course, the agents believed they were entering the residence of the person for whom an arrest warrant had been issued. Putting aside, however, the question of whether for present purposes 191 Berry Hill Court could be deemed the residence of someone other than the fugitive such that the agents would be required to demonstrate some measure of certainty regarding the presence there of the party sought before attempting to execute the warrant within the house, we need not base our disposition of the issue on adherence to the "reasonable belief" standard as opposed to a probable cause standard. A cursory review of the relevant facts establishes that the agents had ample justification, well beyond that which would be required to satisfy the potentially more stringent probable cause standard, in

concluding that the elusive Warren would be found within 191 Berry Hill Court. Warren was known to utilize the alias "Williams." An employee of a Manhattan car dealership had identified a photograph of Warren as a picture of a customer who owned a Rolls Royce, used the name Williams, and lived at 191 Berry Hill Court. Warren was reportedly in the United States, and was believed to have previously directed criminal activities centered on Long Island. The confusion between Williams and Warren was understandably exacerbated by the fact that they had similar lifestyles, were both described as of Jamaican ancestry and had certain physical likenesses, albeit upon closer inspection, they were different in appearance. Perhaps most compelling, three citizens had made positive identifications of Williams as the fugitive being sought from the photograph of Warren displayed by Agent Kobyra, and one of the neighbors later called DEA headquarters to say that the individual was currently at home. *See United States v. Arboleda, supra,* at 3407 n.6. As the agents approached, appellant hastily retreated to the interior of his house where he briefly attempted to barricade himself. In light of the foregoing, the agents were fully justified in attempting to execute their arrest warrant. While appellant was, as it later developed, the victim of circumstance, those circumstances were no less real or compelling to the agents because they ultimately turned out to be remarkable coincidences. *Cf. Hill v. California,* 401 U.S. 797 (1971); *United States v. Rosario,* 543 F.2d 6, 8 (2d Cir. 1976).

Adoption of appellants' position would require that the execution of an arrest warrant on the premises of a third party, or at least in a residence whose right to occupancy was in question, be accompanied by some-

thing approaching a certainty of success. Such a position, of course, must be rejected. The Supreme Court long ago observed that "In dealing with probable cause . . . we deal with probabilities," *Brinegar v. United States,* 338 U.S. 160, 175 (1949). It is therefore of no consequence that a more thorough or more probing investigation might have cast doubt upon the lead Agent Kobyra was following. As we recently noted in a factually different but theoretically analogous context,

> The essence of probable cause is a reasonable, objective basis for *belief* in a suspect's guilt, although not necessarily *proof* of guilt beyond a reasonable doubt.
>
> * * * * *
>
> [W]hile the rule of probable cause does impose a requirement on police to act with more than mere suspicion of wrongdoing, the rule also gives police a permit to act with less than absolute certainty of guilt.

United States v. Webb, slip op. 2597, 2605 (2d Cir. Apr. 28, 1980) (emphasis in original).

Appellants' further assertion that the attempted execution of the warrant was attributable to the agents' desire to search an innocent person's home is equally without factual foundation. Arguably, Williams could have avoided the entry of the law enforcement officers into his home had he permitted them to question him as he lingered on his front landing. By fleeing to the interior of his home after the agents had announced their identities and intentions, Williams himself created an exigent circumstance which plainly justified the

forcible entry into his home and the subsequent security check of the premises. *United States v. Gomez,* slip op. 4353, 4370-71 (2d Cir. July 11, 1980); *United States v. Soyka,* 394 F.2d 443, 453-54 (2d Cir. 1968) (en banc, per Friendly, *J.*), *cert. denied,* 393 U.S. 1095 (1969).

Our review of the facts leads us to conclude that the agents, at a minimum, possessed probable cause to seek to execute the arrest warrant at 191 Berry Hill Court, and perforce, they had a "reasonable belief" in Warren's presence there. Indeed, given the resources and evasiveness of the fugitive, they would have been remiss in their duties had they not acted expeditiously on the information Agent Kobyra had developed.

B. *Nondisclosure of the Identities of Informants.*

In assessing the agents' conduct, the district court did not err in refusing to compel the government to reveal the identities of the individuals who had mistakenly recognized the Warren photograph as portraying Williams. Appellants' counsel wished to examine these witnesses, particularly the two neighbors, to test Agent Kobyra's testimony regarding their statements, and to ascertain if they had a sufficient familiarity with the occupant of 191 Berry Hill Court to render reasonable the agents' reliance on their recognition of the Warren photograph.

Appellants bear the burden of demonstrating entitlement to this information, *In re United States,* 565 F.2d 19, 23 (2d Cir. 1977), *cert. denied,* 436 U.S. 962 (1978), a matter which lies within the sound discretion of the district court. *United States v. Hyatt,* 565 F.2d 229, 231 (2d Cir. 1977). There is no rule or precedent

requiring the government to reveal to defendants the identities of persons supplying it with confidential information. Rather, as was held in *Roviaro v. United States,* 353 U.S. 53 (1957), the trial judge must in each case weigh the interests of the defendant in obtaining such information against the government's desire to encourage the free flow of such information from its citizens. In striking these individualized balances, the Supreme Court has indicated that the most persuasive case for disclosure is where the examination of the informant is necessary to vindicate a defense on the merits and where the withholding of the information will thereby compromise the truth-finding function of the trial. Conversely, the Supreme Court has observed that the need for disclosure is far less compelling when it is sought in connection with pretrial issues, such as the propriety of search or seizure, which do not bear upon the ultimate question of guilt or innocence. *McCray v. Illinois,* 386 U.S. 300, 311-12 (1967).

Noting the limitation placed upon *Roviaro* by *McCray,* this Court has taken the view that while disclosure is not absolutely precluded when sought in regard to a suppression hearing, it will be deemed appropriate only where the information supplied by such persons constitutes the "essence," "core" or "main bulk" of the probable cause upon which the authorities have relied, and where the critical information ascribed to these individuals is not in any significant manner corroborated by independent evidence. *United States v. Comissiong,* 429 F.2d 834, 838-39 (2d Cir. 1970).

It is readily apparent that Judge Pratt was, if anything, considerably more accommodating to appellants' demand than was necessary. The data provided by the informants in this case related solely to the issue

of justification for attempting to execute the arrest warrant, a matter even more remote from a defense on the merits than the usual search and seizure controversy, and light years away from the question of actual guilt or innocence. Appellants sought to examine these informants not primarily to determine if they had in fact made the statements and supplied the information attributed to them, but principally to ascertain if their responses could reasonably have been considered reliable by law enforcement agents. One might well question whether, in light of *McCray*, disclosure of their identities could ever be properly compelled in such a situation. In any event, appellants' access to this information was properly denied under the test enunciated in *United States v. Comissiong, supra.*

The government's concession to the contrary notwithstanding, it appears that there existed sufficient evidence independent of the three misidentifications of Warren's photograph to have established reasonable belief, if not probable cause, to think the fugitive would be found at 191 Berry Hill Court. For example, Warren was known to use the alias Williams, to drive a distinctive Rolls Royce which was serviced at a particular Manhattan dealership, and to make occasional, surreptitious trips to the New York metropolitan area where a grand jury had determined that he previously directed a narcotics operation which was centered on Long Island. Further inquiry revealed that the Rolls Royce thought to belong to Warren was falsely registered. The DEA agents observed from a distance a physical resemblance between Williams and their prey, and their suspicions were galvanized when, upon their approach, appellant fled into his house.

Reasonable belief to execute an arrest warrant requires no more.

Even if the "essence," "core" or "main bulk" of the justification for execution of the warrant was derived from the citizen-informants, the independent evidence gathered by the agents as set forth above, was unquestionably adequate to corroborate the statements attributed by Agent Kobyra to those individuals and to render disclosure of their identities unnecessary under the second prong of the *Comissiong* test. For example, each gave a roughly accurate physical and ethnic description of the fugitive and each, without prompting, volunteered that Williams possessed a Rolls Royce.

Finally, Judge Pratt's *in camera* examination of the informants living near 191 Berry Hill Court completely vindicated Agent Kobyra's testimony, and thereby allayed any reasonable concern that these individuals lacked a basis for making the identification or that Agent Kobyra had misrepresented their statements or actions. Accordingly, there was no error in the district court's thoughtful resolution of this matter.

C. *Legality of the Search Pursuant to the Execution of the Arrest Warrant.*

Appellants, on diametrically opposed grounds, challenge the legality of the limited search made pursuant to the execution of the arrest warrant. Williams presses the theory that the agents upon their entry into his home instantaneously realized their mistake, that further intrusion was consequently unwarranted and that the agents should have immediately and apologetically withdrawn. Manley, on the other hand, urges that the agents must have believed on entry that they had

apprehended the fugitive, and with their mission accomplished, could not have lawfully rummaged through the house.

The conflict between appellants' contentions is enlightening, for it dramatically demonstrates that in all probability the agents did not reach any conclusion as to the success of their endeavor at the very moment they gained admission to Williams' home. Neither Agent Kobyra nor Agent Shea had ever seen Warren in person, and following their forcible entry, made under conditions which were reasonably perceived as dangerous, they did not engage Williams in a lengthy colloquy about his true identity, nor did Williams volunteer his name. On the contrary, Agent Kobyra almost immediately bolted to the rear of the house to admit the back-up agents, and in the course of that activity observed cocaine and narcotics paraphernalia in plain view. Under the circumstances, there is every reason to credit Agent Kobyra's testimony, as Judge Pratt did, to the effect that it was only after completion of the initial search that he began to doubt that Williams was Warren, and even then was not prepared to concede his mistake until some dispositive procedure, such as fingerprinting, had verified Williams' true identity.

The agents' states of mind are irrelevant, however, for under either scenario posed by appellants, there is no doubt that they were entitled to conduct the limited, plain view search of the premises which Judge Pratt properly assumed to have been permissible. Accepting Williams' theory that the agents spontaneously realized their mistake, they were nonetheless entitled to look through the house given the strength of their justification in executing the warrant and their having glimpsed, prior to entry, a second black male darting

across the upstairs landing, who might have reasonably been thought to be the elusive Warren. Accepting Manley's contention that the agents were initially confident that they had captured the fugitive inside the front door, they were nevertheless entitled to make a "security check" of the premises, a practice which this Court has most recently approved in *United States v. Gomez, supra,* slip op. at 4372, and *United States v. Agapito,* 620 F.2d 324, 335-37 (2d Cir. 1980), *petition for cert. filed,* 48 U.S.L.W. 3822 (U.S. June 6, 1980). *See also United States v. Christophe,* 470 F.2d 865, 869 (2d Cir. 1972), *cert. denied,* 411 U.S. 964 (1973). Under these cases, agents effecting an arrest upon private premises who reasonably fear that other persons are lurking within who pose a threat to their safety or are likely to destroy evidence, may conduct a pass-through of the premises to determine the presence of any such persons. The conditions warranting this type of limited search were plainly present in the instant case because the agents were aware both before and immediately after entry of the presence of other people, and because Warren was presumed to be of a violent nature, likely to be armed, and possibly accompanied by criminal co-conspirators. Accordingly, the arresting agents had abundant reason for securing the premises and the evidence in plain view discovered during the course of this procedure was properly admitted at trial. *United States v. Liberti,* 616 F.2d 34, 36-37 (2d Cir. 1980). Judge Pratt's delineation between the materials seized pursuant to this search and those uncovered during the impermissible "consent search" was carefully made and his rulings in that regard are not clearly erroneous.

D. *Sufficiency of the Evidence Supporting Manley's Conviction.*

Manley argues that the evidence was insufficient to support his conviction for attempted possession of narcotics with intent to distribute. Preliminarily, he contends that his arrest was unjustified and that the cash horde discovered on his person and his incriminating statements made pursuant to his arrest should have been suppressed. Further, he asserts that the jury could not have properly concluded that his behavior rose to the level of a criminal attempt to violate the narcotics law. We disagree.

There is no substance to Manley's initial argument since at the time he was detained the agents had probable cause to believe he had engaged in a criminal act. It will be recalled that his arrest came after the agents had spotted him running from a room in which a substantial quantity of cocaine and narcotics paraphernalia were in plain sight and some portion of that cocaine was in the process of being measured. Manley thereupon attempted to conceal himself from the agents. *Cf. United States v. Gomez, supra,* slip op. at 4370. Under these circumstances, the agents were justified in placing him in custody, *United States v. Webb, supra,* slip op. at 2605-08. Consequently, the money found on his person and his subsequently uttered inculpatory statements were properly received at trial.

We also reject appellant's second contention, that his behavior fell short of an illicit attempt. There is no general federal statute proscribing attempt, and it is therefore actionable only where, as in the present case, a specific criminal statute makes impermissible its

attempted as well as actual violation. *United States v. York,* 578 F.2d 1036, 1038 (5th Cir.), *cert. denied,* 439 U.S. 1005 (1978). This Court, along with the Fifth Circuit, has adopted the view set forth in Section 5.01 of the American Law Institute's Model Penal Code (Proposed Official Draft 1962), that the requisite elements of attempt are an intent to engage in criminal conduct and the performance of acts which constitute a "substantial step" towards the commission of the substantive offense. *United States v. Jackson,* 560 F.2d 112, 117-20 (2d Cir.), *cert. denied,* 434 U.S. 941 (1977); *United States v. Stallworth,* 543 F.2d 1038, 1040 (2d Cir. 1976); *see also United States v. Mandujano,* 499 F.2d 370, 376 (5th Cir. 1974), *cert. denied,* 419 U.S. 1114 (1975), *and see United States v. Alvarez,* 610 F.2d 1250, 1254 n.3 (5th Cir. 1980); *United States v. Oviedo,* 525 F.2d 881, 885-86 (5th Cir. 1976).

A substantial step must be something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime, and thus the finder of fact may give weight to that which has already been done as well as that which remains to be accomplished before commission of the substantive crime. *United States v. Jackson, supra,* 560 F.2d at 118-19. In order for behavior to be punishable as an attempt, it need not be incompatible with innocence, yet it must be necessary to the consummation of the crime and be of such a nature that a reasonable observer, viewing it in context could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate the statute.

As we noted in *United States v. Busic,* 549 F.2d 252, 257 n.9 (2d Cir. 1977), "Judicial inquiry into whether a defendant is chargeable with an attempt is necessarily

predictive and focuses on the point when the accused's conduct has progressed sufficiently to minimize the risk of an unfair conviction." A second useful formulation may be found in *United States v. Monholland,* 607 F.2d 1311, 1318 (10th Cir. 1979):

> The cases universally hold that mere intention to commit a specified crime does not amount to an attempt. It is essential that the defendant, with the intent of committing the particular crime, do some overt act adapted to, approximating, and which in the ordinary and likely course of things will result in, the commission of the particular crime.

Whether conduct represents a substantial step towards the fulfillment of a criminal design is a determination so dependent on the particular factual context of each case that, of necessity, there can be no litmus test to guide the reviewing courts. With respect to the case at bar, however, it is clear that the district judge properly submitted the matter to the trier of fact, and that the jury's verdict was supported by evidence amply demonstrating both essential elements of criminal attempt. There can be no doubt that the evidence warranted a finding that Manley possessed the requisite state of mind. The circumstances constituting the probable cause for his arrest have been noted above and plainly bespeak an evil intent. Additionally, following his detention he was found to be carrying a large sum of money, roughly equivalent to the purchase price of the quantity of cocaine found on the scale. His explanations for his presence at Williams' home and for the extravagant amount of cash he was carrying were unpersuasive if not inherently improbable. Certain of

his post-arrest statements could reasonably have been construed as falsely exculpatory while others might well be interpreted as admissions. Furthermore, he took the stand at trial and the jury was entitled not only to reject his testimony, but to draw adverse inferences from what could reasonably have been viewed as a fabrication. *United States v. Tramunti,* 500 F.2d 1334, 1338 (2d Cir.), *cert. denied,* 419 U.S. 1079 (1974).

A somewhat more difficult question arises with respect to the second essential element of intent, namely, the proximity of Manley's conduct to the accomplishment of the crime. In essence, Manley is being punished for intending to purchase narcotics, and in furtherance of that design, carrying to Williams' home a sufficient amount of cash to consummate the transaction and participating in the weighing of the contraband. There is no challenge to the court's instruction on this facet of attempt, and Judge Pratt properly charged the jury that in order to find Manley guilty, his conduct, objectively evaluated, must have been a "substantial step" towards the acquisition of narcotics. The issue posed on appeal is simply whether Manley's actions as described above can, as a matter of law, be viewed as having crossed the frequently imperceptible boundary from preparation into the forbidden territory of attempt. We answer this question in the affirmative.

By his own testimony, Manley enjoyed only the most casual relationship with Williams, deriving almost entirely from Williams' occasional purchase of a sandwich at Manley's Brooklyn food store. Notwithstanding the insubstantiality of their acquaintance, Manley asserts that on Thursday, April 12, 1979, he

received, for the first time, a purely social invitation to visit Williams at home that very night. Manley, who testified to working long and regular hours at his store further claimed to have accepted that week-night invitation, though he had never been to Williams' home before. He claimed that after having closed his store at 10:00 p.m., and after having already returned home and eaten dinner, he drove a considerable distance, late at night, from his home in Brooklyn to Williams' home in West Hempstead, Long Island, purely for purposes of socializing.

More significantly, Manley brought with him on this social call, a very considerable amount of cash, the nocturnal transportation of which, through a high-crime area of Brooklyn seems most surprising both because it was unnecessary to his visit's reputed purpose and in light of his earlier assertion that he felt Brooklyn to be sufficiently dangerous as to require him to carry a gun. Manley explained that a portion of this money was to be used the following day for legitimate business expenses; however, the jury was fully entitled to reject that partial justification, particularly in light of the fact that the amount of cash Manley was carrying, according to expert testimony, was roughly equivalent to the wholesale purchase price of the quantity of cocaine found on the scale seized in the kitchen. It bears repeating in this connection that Manley was seen running from a room in which cocaine was found lying in the open, both on the scale and on the table. Cocaine is a powdery substance, soluble in liquid and otherwise easily susceptible to spoilage or unintended dispersion, and the jury could thus have properly concluded that at the time the agents made

their approach to the house, Manley himself was engaged in its weighing. His attempt to conceal himself does little to bolster his claim of innocence.

Under these circumstances, we decline to reverse the jury's determination that Manley's conduct constituted a "substantial step" towards the actual possession of narcotics. We recognize that this question is always a troublesome one for both judge and jury, and it presents a particularly thorny issue when the offense being attempted is the simple possession of a substance which is easily concealed, rather than mechanically more complex crimes, such as bank robbery, which involve numerous preliminary steps uniquely criminal and generally incompatible with innocent purpose.

Despite the evidentiary difficulties inherent in establishing a criminal attempt to possess narcotics, courts have sustained verdicts where the evidence might be viewed as less compelling than the instant case. *See United States v. Mandujano, supra* (receipt of $650 from undercover agent in exchange for unfulfilled promise to procure narcotics held a "substantial step"). On review of the proof submitted in the case at bar, we find that the jury was justified in concluding that Manley's conduct was part of an attempt to possess narcotics. Indeed, it is hard to conceive of any additional preliminary steps which he could have taken short of the actual acquisition of the narcotics. In sum, the facts of this case render the likelihood of an unfair conviction minimal.

We have carefully considered the various other claims of error raised by appellants and find them to be without sufficient merit to warrant discussion.

The judgments of conviction are affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA,

- against -

FLEUR A. WILLIAMS and
DAVID MANLEY,

Defendants.

- - - - - - - - - - - - - - - - -X

DOCKET NO.
79 CR
249(S)

MEMORANDUM
DECISION

PRATT, J:

An in camera hearing was held on July 13, 1979, at which the court questioned the two "neighbor witnesses" who had been described in earlier testimony on the suppression hearing as people who had identified the person living at the home of defendant Fleur Williams as the individual shown in the photographs which are in evidence as exhibits 13 and A.

The court questioned the witnesses and learned from witness #1 that two agents, Kobyra and another whose name was forgotten, came to the house on April 12, 1979, and asked if #1 knew the person

living in the premises at 191 Berry Hill Court. #1 acknowledged having seem him going in and out. Kobyra showed #1 a photograph which #1 thought was Exhibit A. #1 identified the picture as being the person seen going in and coming out of the house and told Kobyra that Kobyra said they wanted to catch up to the person in the photograph and asked if #1 would call him the next time #1 saw the car around the place. Kobyra stated that the person in the photograph might be out of town and they might not see him soon, but telephone numbers were exchanged.

Later in the day, at about 6:30 or 7:00 p.m., Kobyra called #1 to see if anything had happened and was told nothing had. At about 9:30 or 10:00 p.m., #1 saw, not the Rolls Royce but the black Chevrolet pull into the garage at 191 Berry Hill Court, but did not see who was in the car. #1 called Kobyra and

reported to him that the black car had been driven into the garage.

#1 also testified that the man in question had been living alone at the subject premises and that a cleaning woman came in about once a week. #1 had never seen the Rolls Royce being driven but had seen it washed on some occasions in the driveway, and had seen it parked in the two car garage. #1 testified that the man in question had lived in the subject premises for 4 or 5 months before April, 1979. #1 had seen the Individual both in daylight and at night as he was coming and going from the premises. #1 was not present in the neighborhood when the agents arrived and carried out their raids.

With respect to witness #2, Kobyra made the same approach as with #1. When asked about knowing the person living in 191 Berry Hill Court, #2 responded "you

mean the one with the Rolls Royce?". When then shown the photograph which #2 thought was Exhibit A, but might have been Exhibit 13, #2 said that it was the man who lived at the subject premises. #2 had seen the person coming and going, had never talked to him personally, and had never been closer to him than across the street. #2 agreed to notify Kobyra if the resident of the subject premises should return. #2 did not thereafter talk to Kobyra or any of the other agents, and #2 was not present in the neighborhood when the agents arrived for the raid.

Both #1 and #2 testified that agent Kobyra had done all the talking for the agents, had not said he was looking for a black man or for a West Indian, had not initially brought up the Rolls Royce, and had not mentioned any names of the man he was looking for.

Both #1 and #2 testified that they were fearful of being identified in this matter and desired that their identity be kept secret. After hearing the witnesses' testimony, the court was satisfied that there was a reasonable basis for keeping the identity of these two witnesses confidential, that their testimony has no bearing on the guilt or innocence of the defendant, and that the government's requests for the in camera hearing and that their testimony be sealed were justified. The court ordered that the record be sealed, indicating that this memorandum would be the information made available to defendant for purposes of the hearing and the motion.

Dated: Westbury, New York
July 17, 1979.

GEORGE C. PRATT
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA,

- against -

DAVID MANLEY and
FLEUR A. WILLIAMS,

Defendants.

- - - - - - - - - - - - - - - - - -X

DOCKET NO.
79 CR 249

MEMORANDUM
AND ORDER

PRATT, J:

Possessing a one year old arrest warrant for Donald Grant, and believing in good faith that he was in the single family residence at 191 Berry Hill Court, West Hempstead, Nassau County, New York, DEA agents, at about midnight on April 12, 1979, forcibly entered the house, saw scales and white powder on the kitchen counter, restrained the liberty of the seven occupants, searched the house for Donald Grant, discovered numerous items of contraband and formally arrested the two defendants, David Manley and Fleur A. Williams, who have been indicted for the

conspiracy and substantive violations of distributing cocaine and possessing it with intent to distribute.

Both defendants have moved to suppress the following evidence taken by the agents from the premises:

Hearing Exhibit #	Description
1	Cocaine found on sale in kitchen
2	Cocaine found alongside scale in kitchen
3	Cocaine found in bag on dresser in bedroom
4	Marijuana found in brown garbage bags in kitchen cabinet
5A - 5F	Marijuana found in clear plastic bags under glass top table in hallway
6	Marijuana in opaque garbage bag on floor of bedroom closet
7	Two bottles of lactose found in drawer of dresser in bedroom
8	Weighing scale found on kitchen counter

Hearing Exhibit #	Description
9	Strainer and two spoons found on kitchen counter
10	Silver revolver found on shelf of closet in bedroom
11	Small automatic pistol found on shelf of closet in bedroom

In addition, defendant Manley seeks to suppress some $2,200 in cash (Ex. 12) found when agents searched his person upon his arrest, as well as certain statements made by him at the premises and on the following day while traveling to or from the courthouse in Brooklyn for arraignment. Defendant Williams, also seeks to suppress certain statements made by him at the premises.

The court held an evidentiary hearing that began on June 1, 1979. Before the date scheduled for continuation of the hearing, however, defendant Williams was seriously injured in an accident and

spent several days in the hospital with two broken arms. When defendant Williams had recovered sufficienty, the hearing was continued on July 6, 1979, at the end of which the court requested to hear the testimony of two neighbor witnesses in camera. Decision on the motion was reserved, and a briefing schedule established whereby all briefs were to be submitted to the court by July 30, 1979. This memorandum and order constitutes the court's findings of fact and conclusions of law.

In April, 1978, a warrant was issued out of the United States District Court for the Southern District of New York for the arrest of one Donald Grant, a person known to DEA agents as a black Jamaican male, a "high roller" who lived well, dressed well, spent a lot of money, and traveled around and out of the country frequently. Grant was known by a number

of aliases, including Danny Warren, Danny Williams, Champagne Danny, and Rolls Royce Danny.

In early 1979, agent Kobyra received information from a previously reliable out of state informant that Donald Grant often got his Rolls Royce serviced at a dealership in Manhattan called Haug Motors, that he had seen Grant in the United States as late as December, 1978, that Grant often made trips in and out of the United States for short periods of time and that some of those trips were to New York. Kobyra then went to Haug Motors where he showed two different people several photos, including one of Donald Grant. One of the employees recognized grant and identified him as a customer. Haug Motors' records disclosed that the car, a brown and black Rolls Royce with Washington, D.C., license plates, was owned by a man named

Williams, one of Grant's aliases, who lived at 191 Berry Hill Court.

Kobyra went to the neighborhood of 191 Berry Hill Court and spoke to the mailman, the local police, and neighbors, showing them the photograph of Donald Grant which had been identified by the Haug Motors employee. Two of the neighbors say they recognized the photograph as that of a person living at 191 Berry Hill Court. Each said that he was a night person, with no steady work and drove a black and brown Rolls Royce with Washington, D.C., license plates as well as a black Chevrolet Monte Carlo. He seemed to come and go from time to time, and frequently be gone for extended periods of time. A check of the license plate of the Rolls Royce showed that it was registered to an address in a slum area in Washington, D.C., and the name on the mailbox there was that of a female

called either Williams or Williamson.

Kobyra asked each of the neighbors who had identified the photo to notify him if they saw the individual return to the house. That evening, Kobyra received a call from one of the neighbors who stated that the individual living at 191 Berry Hill Court had just returned home and was presently there.

Kobyra called other DEA agents and advised them to meet Kobyra and agent Shea at the premises. Kobyra and Shea traveled to the premises together, arriving shortly before midnight. After conferring with agents Yanniello and Papantoniou, Kobyra and Shea drove down Berry Hill Court past #191. They noticed a black male standing in front of a picture window in the living room, looking out onto the street. They parked their car beyond #191 and then saw that the person who had been standing in the

window was now outside or in the doorway with door open.

Kobyra advised agents Yanniello and Papantoniou to secure the rear of the house. Kobyra and Shea then approached the house. When Kobyra identified himself to the man standing in the doorway and said he wanted to talk to him, the man slammed the door and locked it. Kobyra and Shea tried to get in. One drew his gun and pointed it at the man through the window alongside the door. At that point the man, later identified as defendant Williams, opened the door.

The two agents entered the house which was a high ranch type with a small foyer in front of the door, with steps leading down to a lower level, and up to the main level of the house. Shea immediately put Williams on the floor of the foyer, and Kobyra ran up the stairs

and through the kitchen to the back door in order to let agents Yaniello and Papantoniou in. The back door was nailed shut and had to be forced open by the two agents from the outside. As Kobyra ran through the kitchen to the back door he saw on the counter in plain view scales, (EX. 8), white powder, (Exs. 1 & 2), a strainer and spoons (Ex.9).

After helping the other two agents to get in, Kobyra began to search through the house to find Donald Grant. In a back bedroom he found Shirley Faggart sitting on a bed. He also saw white powder in a clear plastic envelope (Ex. 3) on the dresser. A quick search of the bedroom closet produced a silver revolver (Ex. 10) which was in plain view. Kobyra went elsewhere in the house which was also being examined by other agents, to find Donald Grant. In the hall under a glass top table were six clear plastic

bags of marijuana (Exs. 5A - 5F). In the house at that time were defendants Williams and Manley, Manley's wife and child and Williams' girlfriend. While the agents were there, another couple arrived. All seven of them were assembled in the living room, read their Miranda rights, and questioned about the circumstances.

Donald Grant was nowhere to be found. Apparently, in identifying the photograph shown to them by agent Kobyra, the employee at Haugh Motors as well as the two neighbors had identified defendant Fleur Williams for the person in the photograph, Donald Grant.

Agent Kobyra testified that after the initial excitement calmed down the defendant Williams had been given his Miranda rights in the living room, Williams, on request "consented" to a more thorough search of the premises. In

the course of that search, conducted after all of the occupants in the house had been assembled at gunpoint in the living room and after the premises had been completely secured, agents discovered four large brown plastic garbage bags of marijuana (Ex. 4) inside a closed cabinet in the kitchen, two bottles of lactose (Ex. 7), used for cutting cocaine, in a dresser drawer in the bedroom, a small automatic pistol (Ex. 11) in the closet in the bedroom and another large bag of marijuana (Ex. 6) on the floor of a closet. The government has failed to show that Williams' "consent" to this second search was freely and voluntarily given. Consequently, the motion to suppress Exhibits 4, 6, 7 and 11 is granted.

All else on this motion depends on the constitutionality of the agents' entering of the premises. Exhibits 1, 2,

3, 5A through 5F, 8, 9 and 10 all were in plain view of the agents as they went through the house seeking to find Donald Grant in order to arrest him. Based on those discovered drugs and drug paraphernalia the agents had probable cause to arrest Manley and Williams. Exhibit 12, the $2,200 taken from defendant Manley, was obtained on a search incident to Manley's arrest. All of the statements sought to be suppressed were made after Miranda warnings had been given, and there is no clai. that they were not voluntary statements.

Manley's claim that he did not hear or understand the Miranda warnings is rejected by the court. While Manley does suffer from some loss of hearing, the court finds that he understood what he had been told and also that he understood that he had no obligation to speak either in explaining why he had $2,000 cash on

him, or, the neaxt day while travelling with the agents, in telling the agents they had let the wrong guy go when they let the buyer leave.

Thus, the central issue presented by defendants is whether the agents had any right to be in 191 Berry Hill Court in the first place. If they did not, then of course, contraband in the house could not lawfully be seized even though it was in plain view of people inside the house. Defendants assert that the agents did not act in good faith, that they did not believe that Donald Grant was in the house, that the warrant for the arrest of Donald Grant was stale, having been issued approximately one year earlier, and that the agents simply used the warrant for Donald Grant's arrest as a pretext for forcibly entering defendant William's house at a time when they knew

or suspected that contraband was there.

Defendants also argue that even when they have an arrest warrant, government agents may not enter and search a house for a person without having, in addition, a search warrant. Even if no search warrant is required, defendants argue that the agents lacked probable cause to believe that Donald Grant, the subject of the arrest warrant, was actually in the premises. As a third argument, defendants claim that the search of the house was too extensive and too intensive to be authorized under the guise of searching for Donald Grant in order to arrest him. Finally, they argue that the arrest warrant was invalid because it was too old

Considerable judicial attention has been focused in recent years on arrests in private homes. In United States v. Reed, 572 F2d (CA2 1978), Judge Meskill

analyzed the leading cases and held that

> * * * in the absence of a warrant to arrest a suspect at home, and in the absence of exigent circumstance, federal law enforcement officers are prohibited by the Fourth Amendment from entering the home of a suspect to evict a felony arrest for which they otherwise have both statutory authority and probable cause.
> 572 F2d at 424
> (emphasis supplied).

Counsel have not cited, nd the court has been unable to discover, any case where authorities hav been denied the right to enter a home to execute an arrest warrant when they had parobable cause to believe the arrestee was present.

Here, there is no question that a warrant existed. Although defendants argue that it was invalid because of its age, they have cited no authority to support the contention. Arrest warrants do not expire with any particular time period. The evidence discloses continuing official interest in Donald

Grant, the subject of the warrant and an active, though perhaps not overly diligent, investigation as to his whereabouts. It would be a strange rule, to say the elast, if a fugitive's success in evading capture could, through mere lapse of time, invalidate the vary warrant from which he was fleeing. The court finds and concludes, therefore, that the arrest warrant itself was valid, even though it had been outstanding for some twelve months.

The court also rejects defendant's contention that in addition to the arrest warrant the agents were required to obtain a search warrant. While there has been some judicial suggestion that an arrest warrant should either designate the authorized place of arrest or be accompanied by a search warrant naming the place where agents can search for the arrestee, see Dorman v. U.S., 435 F2d 385

at 395-96 and footnote 25 (CA DC 1970), the court had found no case in this circuit interpreting the fourth amendment to require such specificity, and no such requirement has yet been imposed by rule or statute.

Effective August 1, 1979, FRCrP 41 was amended so as to permit a search warrant to be issued to search for and seize any "person for whose arrest there is probable cause." Of course, that amendment was not in effect in April of this year when the agents entered defendant Williams' house. Even if it were effective, however, the amended rule only permits such a search warrant, it does not require one.

Discussing the amendment to authorize a warrant to search for persons, the Advisory Committee noted:

> It has sometimes been contended that a search warrant should be required for

a nonexigent entry to arrest even when the premises to be entered are those of the person to be arrested. Rotenberg & Tanzer, Searching for the Person to be Seized, 35 Ohio St.L.J. 56, 69 (1974). Case authority in support is lacking, and it may be that the protections of a search warrant are less important in such a situation because ordinarily "rudimentary police procedure dictates that a suspect's residence be eliminated as a possible hiding place before a search is conducted elswhere." People v. Sprovieri, 95 Ill.App.2d 10, 238 N.E.2d 115 (1968).

Despite these uncertainties, the fact remains that in some circuits under some circumstance a search warrant is required to enter private premises to arrest. Moreover, the law on this subject is in a sufficient state of uncertainty that this position may be taken by other courts. It is thus important that Rule 41 clearly express that a search warrant for this purpose may issue. And even if future decisions head the other direction, the need for the amendment would still exist. It is clear that law enforcement officers "may not constitutionally enter the home of a private individual to search for another person,

> though he be named in a valid arrest warrant in their possession, absent probable cause to believe that the named suspect is present within at the time." Fisher v. Volz, a procedure whereby he may have this probable cause determination made by a neutral and detached magistrate in advance of the entry.
>
> Communication from the Chief Justice, House Document No. 96-112 at 128.

A few courts have held that entry into a third party's home to search for a person for whom an arrest warrant has been issued must be supported by both probable cause to believe the arrestee is there and exigent circumstances. Virgin Island v. Gereau, 502, F2d 914 (CA3 1974); Fisher v. Volz, 496 F2d 333 (CA3 1974); Huotari v. Vanderport, 380 F Supp 645 (D Minn 1974). As this court views the present state of law, however, all that the agents required in addition to the arrest warrant was probable cause to

believe that Donald Grant was in the premises.

Defendants, of course, argue that the agents lacked probable cause to believe that Donald Grant was in the premises, and that in fact, they knew that the occupant of the premises was not Grant but defendant Fleur Williams. If defendants were correct and the agents did act in such bad faith, then, of course, the motion to suppress would be granted. However, the court disagrees with defendants' evaluation of the agents' conduct and state of mind.

The agents had a valid warrant for Grant's arrest. They knew him to be elusive, to travel in and out of the United States, to drive a Rolls Royce that was serviced at Haugh Motors, to be a black male Jamaican, and to live expensively. When they received the tip that he might be in the New York area and

that he sometimes had his Rolls Royce serviced at Haug Motors, they took a photograph of Grant to Haug Motors and were told that the person in that photograph did have a Rolls Royce, that he was a black Jamaican, and that he lived at 191 Berry Hill Court. From there, the agents obtained further eyewitness identification of the photograph as being that of a person living at 191 Berry Hill Court.

The agents also knew that Grant used a variety of aliases including the name Williams. The Rolls Royce garaged at 191 Berry Hill Court and serviced at Haugh Motors was registered in the name of a person named Williams and Williamson. The agents also knew that the occupant at 191 Berry Hill Court came and went at odd hours, did not follow a normal work pattern, and was frequently gone for long periods.

Thus, when agent Kobyra received a call that the man in the picture had just returned to 191 Berry Hill Court, he had probable cause to believe that Donald Grant, the person for whom he had a valid arrest warrant, was actually in those premises. The court finds that the agents acted carefully, reasonably and in good faith.

The arrest warrant, coupled with the good faith belief, based on probable cause, that the subject was in the house, gave constitutional authority to the agents to enter the house and search it for Donald Grant. In the course of that search they discovered much of the contraband in plain view, thereby providing a valid basis for arresting the defendants without a warrant.

The court recognizes that special protection under the fourth amendment must be granted a person in his own home,

protections which extend against both searches and arrests. However, where a valid arrest warrant has been issued and a government agent acting in good faith has probable cause to believe that the subject of the warrant is actually within a residence, entry of that house to arrest the subject is not unreasonable within the meaning of the constitution. Even defendants acknowledge in their post-hearing memorandum that Donald Grant's absence from the premises does not render the entry unreasonable. The test is whether the officers acted in good faith and whether they had probable cause to believe that the subject of the warrant was in the premises.

Based on the testimony of the witnesses at the hearing, as well as of the two neighbors taken at the in camera hearing, the court finds the testimony of agent Kobyra as to the cricumstance

leading to the entry of the house to be credible. The neighbors did identify the person in the photograph as the one who was living in the premises, and on of the neighbors later reported that he was then in the house. There was some difference between the agent and the neighbors as to which of the two photographs in evidence was shown to the neighbors. The court does not consider the difference significant and disagrees with counsel's evaluation of the photographs, both of which were of Donald Grant. To the court's eye, the differences between the two photographs were not nearly as marked as claimed by defendant's counsel, and both of the photographs might reaasonably and in good faith have been mistaken as being of defendant Williams.

Accordingly, defendants' motion to suppress Exhibits 4, 6, 7, and 11 is granted. Their motion to suppress

Exhibits 1, 2, 3, 5A 8, 9, 10 and 12, as well as the statements made by Manley and Williams referred to above, is denied.

Counsel are reminded that jury selection is scheduled for August 29, 1979.

SO ORDERED

Dated: Westbury, New York
August 15, 1979.

_____
GEORGE C. PRATT
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - -X DOCKET NO.

79 CR 249
UNITED STATES OF AMERICA,

MEMORANDUM

AND ORDER
- against -

DAVID MANLEY and
FLEUR A. WILLIAMS,

Defendants.
- - - - - - - - - - - - - - - - -X

PRATT, J:

Counsel for defendants having pointed out an error in the court's memorandum and order dated August 15, 1979, said memorandum and order is hereby amended as follows:

On page 5 the second sentence of the first paragraph is amended to read as follows:

> That evening, Kobyra received a call from one of the neighbors who stated that the black Chevrolet driven by the individual living at 191 Berry Hill Court had just returned to that address and someone had entered the house and was presently there.

On page 13, the last sentence of the

first full paragraph is amended to read as follows:

> From there, the agents obtained further eyewitness identification of the photograph as being that of a person living at 191 Berry Hill Court, who drove both a Rolls Royce and black Chevrolet.

On pages 13 and 14 the sentence beginning the carry-over paragraph is amended to read as follows:

> Thus, when agent Kobyra received a call that the black Chevrolet, which had previously been driven by the man in the picture, had just returned to 191 Berry Hill Court, he had probable cause to believe that Donald Grant, the person for whom he had a valid arrest warrant, was actually in those premises.

In all other respects the court's memorandum and order of August 15, 1979, remains unchanged.

SO ORDERED.

Dated: Westbury, New York
September 7, 1979.

GEORGE C. PRATT
U.S. DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA,

SUPERCEDING INDICTMENT

- against -

DAVID MANLEY, and
FLEUR A. WILLIAMS, also known as "Anthony Watson",

Defendants.
- - - - - - - - - - - - - - - - -X

GRAND JURY CHARGES:

COUNT ONE

On or about the 13th day of April, 1979, within the Eastern District of New York, the defendants, DAVID MANLEY and FLEUR A. WILLIAMS, also known as "Anthony Watson", together with others known to the Grand Jury, did knowingly and intentionally conspire to violate Section 841(a)(1) of Title 21, United States Code.

1. It was part of said conspiracy that the defendants and co- conspirators would knowingly and intentionally

distribute and possess with intent to distribute quantities of cocaine hydrochloride, a Schedule II narcotic drug controlled substance, and quantities of marijuana, a Schedule I controlled substance.

2. It was further part of said conspiracy that the defendants and co-conspirators would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities. (Title 21, United States Code, Section 846).

COUNT TWO

On or about the 13th day of April, 1979, within the Eastern District of New York, the defendant, FLEUR A. WILLIAMS, also known as "Anthony Watson", did knowingly and intentionally possess with intent to distribute approximately one hundred eighty eight (188) grams of

cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1).

COUNT THREE

On or about the 13th day of April, 1979, within the Eastern District of New York, the defendant, DAVID MANLEY, did knowingly and intentionally attempt to possess with intent to distribute approximately fifty five (55) grams of cocaine hydrochloride, a Schedule II narcotic drug controlled substance in violation of Title 21, United States Code, Section 841(a)(1). (Title 21, United States Code, Section 841(a)(1) and 846).

COUNT FOUR

On or about the 13th day of April, 1979, within the Eastern District of New York, the defendant, FLEUR A. WILLIAMS,

also known as "Anthony Watson", having been convicted on the 9th day of January, 1976 at White Plains, New York, of Criminal Possession of a Controlled Substance, a crime punishable by imprisonment for a term exceeding one year knowingly did receive a firearm, such firearm being a Star, 9 millimeter, automatic pistol, serial no. 467102, which had been shipped and transported in foreign commerce from Spain to the United States. (Title 18, United States Code, Section 922(h) and 924(a)).

A TRUE BILL.

Surrogate's
Warrant of Arrest

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

Magistrate's Docket No. 78
Case No. 416

- - - - - - - - - - - - - - - -x
UNITED STATES OF AMERICA :

v. :

DANNY WARREN, a/k/a Danny Williams, a/k/a Donald Grant, a/k/a Rolls Royce Danny, a/k/a Champagne Danny and Jerry Arnold, : WARRANT OF ARREST

Defendants. :
- - - - - - - - - - - - - - - -x

To ANY U.S. MARSHAL OR AUTHORIZED OFFICER:

You are hereby comanded to arrest DANNY WARREN (as herein above described, and bring him forthwith before the nearest available United States Magistrate to answer to a complaint charging him with Distribution,

possession Narcotic Drug, in violation of U.S.C. Title, 21, Sections 812, 841(a)(1) and 841(b)(1)(A).

Date April 12, 1978.

SOL SCHREIBER

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D., N.Y.

EASTERN DISTRICT OF NEW YORK

DEFENDANT
FLUER A. WILLIAMS Docket No. 79 CR 249(S-1)

JUDGMENT AND PROBATION/COMMITMENT ORDER
COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date (Month Day Year) (11 14 79)

( ) WITHOUT COUNSEL
(x) WITH COUNSEL
However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

BARRY TURNER
(Name of Counsel)

PLEA
( ) GUILTY, and the court being satisfied that there is a factual basis for the plea,

( ) NOLO CONTENDERE,

(x) NOT GUILTY

FINDING & JUDGMENT

Defendant has been convicted of the offense(s) of violating Title 21, United States Code, Section 841(a)(1).

SENTENCE OR PROBATION ORDER, SPECIAL CONDITIONS OF PROBATION, ADDITIONAL CONDITIONS OF PROBATION

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 6 years plus a Special Parole Term of 6 years. Execution of Sentence stayed pending outcome of the appeal. On motion of the Assistant United States Attorney underlying indictments 79 CR 249 and 79 CR 249(S) and counts 1 and 4 of 79 CR 249(S-1) are dismissed.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by Law, may issue a warrant and revoke probation for a violation occurring during the probation period.

ADDITIONAL CONDITIONS OF PROBATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshall or other qualified officer

Signed by
(x) U.S. District Judge

( ) U.S. Magistrate _____

Date 11/14/79

No. 80-762

In the Supreme Court of the United States

OCTOBER TERM, 1980

FLEUR WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-762

FLEUR WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to six years' imprisonment to be followed by six years' special parole. The court of appeals affirmed (Pet. App. A). On December 3, 1980, Mr. Justice Marshall denied petitioner's application for a stay of the mandate. Upon issuance of the mandate by the court of appeals, petitioner was ordered to appear on December 9, 1980, to commence service of his sentence. He failed to surrender, however, and he is currently at large. In light of petitioner's present fugitive status, he is not entitled "to call upon the resources of the Court for determination of his claims." *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1980

DOJ-1980-12